No. 87-946

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1987

CITY OF PALO ALTO,
CITY OF PALO ALTO UTILITIES
and CITY OF ATHERTON,
Appellants,
vs.
CENTURY FEDERAL, INC.,
UNITED STATES OF AMERICA,
Appellees.

On Appeal From The United States District Court For the Northern District of California

BRIEF *AMICI CURIAE* OF THE CITY AND COUNTY OF SANTA CRUZ, POLITICAL SUBDIVISIONS OF THE STATE OF CALIFORNIA, IN SUPPORT OF APPELLANTS

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INTRODUCTION AND SUMMARY OF ARGUMENT

Rapid expansion in the market for cable television services has required local government to balance the competing concerns of consumers against the needs of cable operators who wish to operate within its jurisdiction. Local government's interests in this regard include, but are not confined to, the provision of access to cable services on a nondiscriminatory basis to all of its citizens.

In addition, state and local public entities are now primarily responsible for insuring that all segments of the community can input the local cable television system with their own individual and unique dreams and ideas.

Congress recognized that cities and counties would be faced with competing policy considerations. The Cable Communications Policy Act of 1984 ("Cable Act"), 47 U.S.C. § 521 *et seq.*, was designed, in part, to "establish guidelines for the exercise of Federal, State and local authority with respect to the regulation of cable systems." 47 U.S.C. § 521(3). It is therefore imperative that local government possess a constitutionally permissible set of guidelines, responsive to the interests of both cable operators and consumers, on which to base their policies and actions. The federal mandates of the Cable Act largely fulfilled this role, but the Cable Act has been undermined by several lower court decisions from California, including that which is the subject of the instant appeal, which have invalidated local cable ordinances patterned after the Cable Act based upon a perceived conflict with the First Amendment of the United States Constitution. On the other hand, other trial courts and appellate decisions have upheld local legislation modeled on the Cable Act. Local government must now operate in a state of absolute constitutional confusion if it acts pursuant to the Cable Act. A substantive decision by this Court in *Palo Alto* will hopefully determine the constitutionality of the Cable Act and, in the process, resolve important First Amendment questions concerning both the cable industry and the right of private individuals and institutions to utilize public property for parochial purposes.

ARGUMENT

I.

LOCAL GOVERNMENT'S SEARCH FOR GREATER CERTAINTY IN THE AREA OF CABLE TELEVISION REGULATION WOULD BE FACILITATED BY A DECISION FROM THIS COURT ADDRESSING THE FIRST AMENDMENT ISSUES RAISED BY PALO ALTO'S APPEAL.

A. It Is Critical To Local Government That The Constitutionality Of The Cable Communications Policy Act Of 1984 Be Determined.

Like the City of Palo Alto herein, numerous public entities throughout the land, including the City and County of Santa Cruz ("Santa Cruz"), have incorporated the terms of the Cable Act in their own regulatory schemes. Indeed, federal law mandates no less; the Cable Act on its face states that state and local legislation inconsistent with the Act is preempted. 47 U.S.C. § 556(c). The Cable Act was a finely-tuned compromise between the cable industry and representatives of local government (*See* Appellant's Brief at 21, quoting 130 Cong.Rec. H10435). Conflicting federal court decisions regarding the ability of government to regulate cable may well have been a motivation for the adoption of the Cable Act. (*See* House Report No. 98-934 at p. 31, *reprinted in* 1984 U.S. Code Cong. Admin. News 4655, 4668 ("Cable Access: First Amendment Consideration"))

Local government had a short-lived reason for relief with reliance on the Cable Act as a model for local cable television franchising ordinances. The Cable Act's explicit authorization of such practices as the granting of a single franchise in a given geographical area (47 U.S.C. § 541(a)), requiring that a cable franchisee set aside a specific number of cable channels for commercial use by

unaffiliated persons ("lease access") (47 U.S.C. § 532), requiring that channel capacity for public, institutional and governmental use be provided ("PEG access") (47 U.S.C. § 531), requiring that cable service be provided throughout the entire jurisdiction ("universal service") (47 U.S.C. § 541(a)(3)), and requiring the provision of state-of-the-art facilities and equipment (47 U.S.C. § 544(b)), instilled confidence in local government that such provisions could be legally incorporated into their local legislation. However, the decisions of two federal district courts in California have effectively destroyed local govenrment's reliance on the Cable Act as constitutional authority in cable television regulation. See *Century Federal, Inc. v. City of Palo Alto*, 579 F.Supp. 1553 (N.D.Cal. 1984); *Century Federal, Inc. v. City of Palo Alto*, 648 F.Supp. 1465 (N.D.Cal. 1986); *Century Federal, Inc. v. City of Palo Alto*, No. C-85-2168 EFL (N.D.Cal., September 1, 1987); *Group W Cable, Inc. v. City of Santa Cruz and County of Santa Cruz*, 669 F.Supp. 954 (N.D.Cal. 1987). In these cases, local cable television ordinances modeled on the Cable Act[1] were struck down as violative of the First Amendment of the United States Constitution.

On the other hand, the Western District of Pennsylvania has upheld local legislation which incorporated certain terms of the Cable Act; specifically, the PEG access requirements authorized by 47 U.S.C. § 531. *Erie Telecommunications, Inc. v. City of Erie*, 659 F.Supp. 580, 599 (W.D.Pa. 1987). In arriving at its conclusion, the *Erie* court examined the Cable Act in light of this Court's earlier decision, in *Midwest Video Corporation v. FCC*, 440

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[1] *See* opinion in *Group W Cable, Inc. v. City of Santa Cruz and County of Santa Cruz*, 669 F.Supp 954 (N.D.Cal. 1987) at 963 ("The [Cable] Act clearly envisions a franchise model similar to Santa Cruz's procedure.").

U.S. 689, 99 S.Ct. 1435 59 L.Ed.2d 692 (1979) (*Midwest Video II*) and determined that the question of "whether access requirements could survive First Amendment challenges" has explicitly been left open by this Court, and that the access policy promulgated by Congress in the Cable Act was "an attempt to satisfy the concerns of the *Midwest Video II* opinion." *Erie Telecommunications*, 659 F.Supp. 580, 599 (W.D.Pa. 1987).

With the arrival of *Century Federal*, *Group W* and *Erie Telecommunications*, local governments were faced with a quandary as to the constitutionality of the Cable Act and, correspondingly, the validity and integrity of local cable television legislation patterned thereafter. A public entity which now wishes to enact a constitutionally supportable cable television franchise ordinance has no guidance in this regard.[2] It must literally throw the dice if it incorporates in its ordinance Congressionally sanctioned and presumptively constitutional provisions. A decision from this Court would eliminate this confusion and provide a framework on which local cable legislation may rest.

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[2]A classic example of the mixed messages currently being sent to local government is the "Say No — Mean Yes" attitude of Judges Lynch and Schwarzer in *Palo Alto* and *Santa Cruz*. In both cases, the Courts issued orders which clearly and unambiguously prevented those public entities from enforcing ordinance provisions expressly authorized by the Cable Act. Yet, both judges refused to acknowledge that their decisions constituted a frontal attack upon the Cable Act and held that the Cable Act was not implicated in their decisions. (*Century Federal, supra*, at 1, n.1; *Group W Cable, Inc. v. City of Santa Cruz, supra*, at 958, n.8.) Amici Santa Cruz respectfully submit that both decisions are direct declarations of unconstitutionality of material portions of the Cable Act. However, if public entities cannot even be sure of the declared unconstitutionality of an Act of Congress affecting the public interest, how can those same public entities be expected to fashion a legislative scheme which constitutionally balances the interests of cable operators and consumers?

B. This Court Has An Opportunity To Resolve A Multi-Circuit Conflict With Respect To The Interplay Between The First Amendment And Cable Television Regulation.

Inherent in this Court's disposition of *Century Federal* may be the resolution of a number of First Amendment issues relating to the cable industry. Foremost among these questions is the level of First Amendment protection due the cable medium — a question left expressly unanswered by this Court in *Los Angeles v. Preferred Communications*, 476 U.S. ____, 106 S.Ct. ____, 90 L. Ed. 2d 480 (1986) (*Preferred II*). Because federal appellate courts have split on this issue and related questions[3], a decision from this Court in the instant case could resolve the conflict and clarify the respective rights and obligations of cable operators and the local governments with which they interact.

The threshold question as to the level of First Amendment protection afforded cable operators specifically requires resolution of whether that medium is most analogous to the print medium, which has traditionally been free from all but the least intrusive of governmental regulation and subject to heightened First Amendment scrutiny, see *Miami Herald Publishing Company v. Tornillo*, 418 U.S. 241, 945 S.Ct. 2831, 41 L.Ed.2d 730 (1974), the broadcast medium, which has been subjected to more governmental regulation and received less searching First Amendment review, see *Red Lion Broadcasting Company v. FCC*, 395 U.S. 367, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1969), or some totally independent framework.

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[3]Compare *Preferred Communications v. City of Los Angeles*, 754 F.2d 1396 (9th Cir. 1985) with *Central Telecommunications v. TCI Cablevision*, 800 F.2d 711 (8th Cir. 1986), *cert. denied*, ____ U.S. ____, 107 S.Ct. 1358, 94 L.Ed.2d 528 (1987).

The traditional justification for the interventionist treatment of the broadcast medium with respect to First Amendment issues is that the physical scarcity of radio waves requires the imposition of a system of regulation in order to allocate this limited resource. See *Century Federal, Inc. v. City of Palo Alto*, 579 F.Supp. 1553, 1563 (N.D.Cal. 1984); *National Broadcasting Company v. United States*, 319 U.S. 190, 226-27, 63 S.Ct. 997, 1014, 87 L.Ed. 1344 (1943). Some courts have recognized the similarity between the limited electromagnetic spectrum and the limited availability of pole and conduit space in local utility infrastructures which must accommodate the physical hardware of a cable television system. In particular, the Tenth Circuit has recognized that such physical limitations render this analogy apt. *Community Communications, Inc. v. City of Boulder,* 660 F.2d 1370, 1378 (10th Cir. 1981), *cert. dismissed,* 456 U.S. 1001, 102 S.Ct. 2287, 73 L.Ed.2d 1296 (1982). *See also, Berkshire Cablevision of Rhode Island v. Burke,* 571 F.Supp. 976, 986-87 (D.R.I. 1983), *vacated as moot,* 773 F.2d 382 (1st Cir. 1985). The Ninth Circuit, on the other hand, has explicitly rejected this argument and refused to analogize the broadcast and cable media on that basis, *Preferred Communications v. City of Los Angeles,* 754 F.2d 1396, 1404 (9th Cir. 1985) (*Preferred I*). The District of Columbia Circuit has aligned itself with the Ninth Circuit on this issue. *Home Box Office, Inc. v. FCC,* 567 F.2d 9, 44-45 (D.C. Cir.), *cert. denied,* 434 U.S. 829, 98 S.Ct. 111, 54 L.Ed.2d 89 (1977); *Quincy Cable T.V. v. FCC,* 768 F.2d 1434, 1448-49 (D.C. Cir. 1985), *cert denied,* ____ U.S. ____, 106 S.Ct. 2889, 90 L.Ed.2d 977 (1986) (striking down FCC "must carry" regulations for cable television).

A more compelling analogy between the cable and broadcast media is based on the argument that cable television is a "natural monopoly," and that the economic limitations on that market are analogous to the physical

limitation of radiowaves in the broadcasting medium, thus warranting a significant degree of governmental regulation. *See,* e.g., *Omega Satellite Products v. City of Indianapolis,* 694 F.2d 119, 126-27 (7th Cir. 1982) (Posner, J.), *cert. denied,* ____ U.S. ____, 106 S.Ct. 2889, 90 L.Ed.2d. 977 (1986) (explaining the "natural monopoly" phenomenon as applied to cable television and concluding that it provides "an argument for regulation of entry"); *Central Telecommunications v. TCI Cablevision, supra,* 800 F.2d 711, 714-717 (8th Cir. 1986) (following 7th and 10th Circuits in holding that the natural monopoly of a local cable market justified exclusive franchising). Indeed, the Tenth Circuit has dubbed both the physical and economic limitations of the cable market as "medium scarcity," and agreed that these limitations might justify significant government regulation of the cable industry in the face of First Amendment challenges. *Community Communications, supra,* 660 F.2d at 1378. *See also, Berkshire Cablevision, supra,* 571 F.Supp. at 986-87 ("For this court, at least, scarcity is scarcity — its particular source, whether 'physical' or 'economic,' does not matter if its effect is to remove from all but a small group an important measure of expressing ideas."); *Affiliated Capital Corporation v. City of Houston,* 700 F.2d 226, 234 (5th Cir. 1983) *cert. den.,* 474 U.S. 1053, 106 S.Ct. 788, 88 L.Ed.2d 766 (1986) (assuming that cable television is a natural monopoly in the context of a discussion of antitrust violations).

While the Ninth Circuit in *Preferred I* declined to decide the "natural monopoly" issue due to the procedural posture of the case, it suggested that it found such an argument unpersuasive. 754 F.2d at 1404. The District of Columbia Court of Appeals has expressly disavowed the "natural monopoly" theory, and invoked this Court's First Amendment treatment of the print medium to assert that "purely economic constraints" cannot justify otherwise unwarranted intrusions into First Amendment

rights. *Quincy Cable Television, Inc., supra,* 768 F.2d at 1450. The Northern District of California, in the *Century Federal* and *Group W* decisions, has adopted this reasoning.

Finally, the physical disruption of the public domain resulting from the installation of a cable television system has justified governmental regulation of that industry and distinguished it from the print medium.

> . . . [a] cable operator must lay the means of his medium underground or string it across poles in order to deliver his message. Obviously, this manner of using the public domain entails significant disruption, especially to streets, alleys, and other public ways. Some form of permission from the government must, by necessity, precede such disruptive use of the public domain. We do not see how it could be otherwise. A city needs control over the number of times its citizens must bear the inconvenience of having its streets dug up and the best times for it to occur. Thus, government and cable operators are tied in a way that government and newspapers are not. *(Community Communications, Inc. v. City of Boulder, supra,* 660 F.2d 1370, 1377-78 (10th Cir. 1981).)

In accord with this reasoning are the Seventh Circuit (*Omega Satellite Products, supra,* 694 F.2d at 127) and the Federal District Court for the District of Rhode Island (*Berkshire Cablevision, supra,* 571 F.Supp. at 985). While conceding that a cable operator's use of public facilities "provides a justification for some governmental regulation" because "[t]he city has legitimate interests in public safety and in maintaining public thoroughfares," *Preferred I, supra,* 754 F.2d at 1406, both the Ninth Circuit decision in *Preferred,* and its District Court progenies of *Palo Alto* and *Santa Cruz,* have drastically limited the types of regulatory actions that local govern-

ment may take by prohibiting such federally sanctioned requirements as exclusive franchising, public access channels and facilities, lease access, universal service, and state-of-the-art service requirements.

These differences in analytical and theoretical approaches have necessarily impacted the judicial treatment of local cable ordinances, which have often incorporated the terms of the Cable Act. The validity of such regulations has been primarily analyzed under the controlling test, set forth in *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), for weighing the constitutionality of regulations directed at the non-speech elements of First Amendment conduct. However, the application of this test has led to widely disparate results. The different views as to the level of First Amendment protection afforded cable have particularly affected the analysis under the second and fourth prongs of the *O'Brien* test: whether the regulation furthers an important substantive government interest, and whether the incidental restriction on First Amendment freedoms is no greater than is essential to the furtherance of that interest. Compare, e.g., *Preferred I, supra*, 754 F.2d at 1396, 1406-7 ("[T]he city's interest is not enough to counterbalance the risk that diversity in editorial judgments will be limited by the city's determination to chose the cable providers . . .") with *Erie Telecommunications, supra*, 659 F.Supp. 580, 609 ("The instant mandatory access regulations produce only a minimal intrusion of ETI's exercise of First Amendment rights.").

In short, the last several years have produced a plethora of conflicting decisions regarding the degree of permissible governmental regulation of cable television. The Seventh, Eighth and Tenth Circuits have sustained pervasive regulation based upon, among other factors, the natural monopoly characteristics of cable and its perma-

nent occupation of public property. The Ninth Circuit and the District of Columbia Circuit appeared to have invoked an analytical model closer to the print medium. Due to the procedural posture of the case, and its issue composition, *Palo Alto* provides this Court with an excellent opportunity to examine and dissect the cable animal and determine its proper place on the media spectrum.

CONCLUSION

Thus, until there is some direction from this Court, the decisions of the federal appellate courts will continue to be skewed, and state and local agencies will be at a loss to ascertain the constitutionally permissible level of government regulation. Cable television is a national industry with a significant impact on the public. Congress saw fit to provide a comprehensive regulatory policy designed to balance the interests of the local and state franchisors and cable franchisees. This Court, consistent with that Congressional effort, should avail itself of the unique opportunity afforded by this appeal to provide desperately needed clarity in this area.

DATED: January 7, 1988

Respectfully,

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I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On January 7, 1988, I served the within AMICI CURIAE BRIEF in re: "City of Palo Alto vs. Century Federal Inc." in the United States Supreme Court, October Term 1987, No. 87-946;

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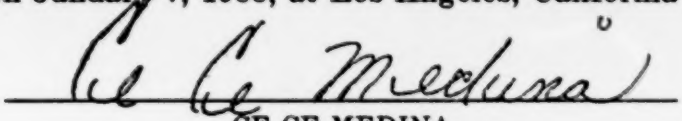
I certify under penalty of perjury, that the foregoing is true and correct.

Executed on January 7, 1988, at Los Angeles, California



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